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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1784

BESSIE DUKE GONZALES AND LOUIS B. GONZALES,
Plaintiffs-Appellants,

versus

CHECKER CABS, INC., ET ALS,
Defendants-Appellees.

PETITION FOR CERTIORARI TO THE SUPREME COURT OF LOUISIANA

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TABLE OF CONTENTS

	Page
Opinions Below	1
Jurisdiction	2
Statement of the Case	2
Certificate	8
Appendix A	1a
Appendix B	6a

TABLE OF AUTHORITIES

Cases:

Atlantic Coast Line R. Co. v. De Mayo, 222 F.2d 462	7
Capital Transit Co. v. Jackson, 149 F.2d 839, 80 U.S.App. D.C. 162, 161 A.L.R. 10 certiorari denied 66 S.Ct. 143, 326 U.S. 762, 90 L.Ed., 459	7
Estepp v. Norfolk & W. Ry. Co., 192 F.2d 889 Sixth Circuit Court of Appeals 1951	5
Hollinquest v. Kansas City Southern Ry. Co., 88 F.Supp. 905	7
Matsumoto v. Chicago & N.W. Ry. Co., 168 F.2d 496, certiorari denied, 69 S.Ct. 52, 335 U.S. 826, 93 L.Ed.	7
Shackelford v. Mission Taxi Cab Co., 224 F.2d 857	6

Other Authorities:

Modern Federal Digest, Vol 7 "CARRIERS" Key Number 316 (1)	4, 5
3 Shearman & Redfield on Negligence (Rev. Ed.). 502, page 1264	6

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To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States.

Petitioners herein seek a Writ of Certiorari to the Supreme Court of Louisiana wherein said Court refused to review a decision of the Fourth Circuit Court of Appeal, the intermediate appellate court in Louisiana.

OPINIONS BELOW

The opinion of the Supreme Court of Louisiana, a memorandum decision, was rendered Mar. 1, 1974,

denying certiorari, and is reported in 290 So.2d 333. The Court of Appeal decision is reported in 286 So.2d 718. See Appendix A & B.

JURISDICTION

The order or judgment of the Louisiana Supreme Court was entered on the 1st day of March (See Appendix A) This petition for certiorari is being filed within 90 days from said date. Jurisdiction of this Court is invoked under 28 U. S. C. Section 1257 (3).

STATEMENT OF THE CASE

On December 23, 1964, Mrs. Bessie Duke Gonzales was a fare-paying passenger in a Checker Cab which had brought her and three other fellow employees from the Orleans Parish School Board Office to a restaurant for a noon day luncheon.

The Checker Cab came to a stop where the driver sought to discharge his four passengers several feet from the curbing, in front of a parking lot reserved for customers of the steak house.

Mrs. Gonzales was seated on the front seat with the driver. After paying the fare, and while she was in the act of getting out of the cab, the cab began to roll forward, with the result that she fell to the street and sustained a fracture of the neck of the right femur.

The cab driver, who was not looking at the plaintiff, now got out of his cab, but by the time that he got to the rear of his cab, the cab started to roll forward again; so he got back into the cab, turned the motor off, and brought the cab to a complete stop.

She was hospitalized on three different occasions, having spent seventy-one days in the hospital, was confined to a wheel chair for a period of six months after being hospitalized, then had to use a Canadian crutch. The last hospitalization was for the excision of the head of the right femur, which had developed aseptic necrosis, and the insertion of a steel ball into the hip socket. At the time of trial, she had a 35% to 40% permanent disability of the lower right extremity.

The petition pleaded the doctrine of *res ipsa loquitor*, especially since she was a fare paying passenger of a common carrier; and further that the driver of the cab was negligent in failing to keep his cab under control; failing to bring his cab to a complete stop close to the curbing so as to discharge his passengers on the sidewalk; failing to turn the motor off while discharging passengers; failing to apply his brakes while discharging passengers; permitting his cab to roll forward while she was alighting from the cab; and failing to get out of his cab and assist his passengers while discharging them.

Neither the Trial Court nor the Court of Appeals of Louisiana seemed to be aware of the rule as to the burden of proof where the liability of a public carrier for negligence is involved. This rule is well recognized

by a number of cases collected in Modern Federal Digest, Vol. 7 "CARRIERS" Key Number 316 (1), discussed below.

Despite the fact that there were two eye-witnesses who testified that the taxicab had started moving forward while petitioner was getting out, both the trial court and the Court of Appeal treated the problem as just another case of the failure of a plaintiff to carry the burden of proof.

Moreover, in weighing the evidence, the Court of Appeal went to some extraordinary lengths in sniping at the evidence produced by petitioner. Since this application is based strictly upon the legal proposition presented quo ad burden of proof where public carriers are involved, we shall not pursue at any length the speculative processes indulged in by the Louisiana Court of Appeal in ruling for the respondents. But the following sample of the Court's analysis will suffice to indicate how far afield the Court went once it got off the track as to the burden of proof where public carriers are involved. Said the Court: (Appendix A)

> Both of these witnesses, shortly after the injury of plaintiff gave statements to an adjuster for the company that provided automobile liability insurance on plaintiffs' personal vehicle which *included* medical payments coverage. *Both statements failed to mention the asserted fact that the cab rolled forward as alleged.*

The record shows, however, that the statements given by the witnesses to the insurance adjuster mentioned above, *were prepared by the adjuster.* Small wonder that he failed to include any reference to the key factor as to liability, i.e. whether the cab started moving as petitioner was alighting.

Thus it was that, having gotten off the main trail, the rule as to the burden of proof applicable to public carriers, the Louisiana Court of Appeal, like a good bird dog, was somehow diverted onto the rabbit trails of irrelevancy and completely ignored the quail of truth.

REASONS FOR GRANTING THE WRIT

Certiorari should be granted herein so that Louisiana will be led back into the Union of these United States. Moreover, the ambiguity and confusion evident in certain Federal Circuits calls for some clarification, particularly as to the application of the doctrine of *res ipsa loquitur.*

The many cases on this subject are collected in Modern Federal Digest, Vol. 7, "CARRIERS" Key No. 316 (1) et seq. For instance, in Estepp v. Norfolk & W Ry Co, 192 F. 2d 889 Sixth Circuit Court of Appeal, 1951 the Court declared "(1,2) Plaintiff contends that the doctrine of res ipsa loquitur applies, and creates a presumption of negligence which bridges the gap in the testimony. This rule comes into force where the circumstances accompanying an injury warrant an infer-

ence of negligence on the part of the defendant. It applies to carriers of passengers when an injury is caused by some act of the defendant or by some instrumentality which at the time was under the control and management of the defendant, and the accident was such as would not happen in the ordinary course if the defendant had used proper care. In the absence of explanation by the defendant under such circumstances a presumption arises that the injury was caused by the defendant's negligence. 3 Shearman & Redfield on Negligence (Rev. Ed.). 502, page 1264 and numerous cases cited."

In Shackelford v. Mission Taxi Cab Co., 224 F.2d 857, a 1955 decision by the Ninth Circuit Court of Appeal, the Court declared at Page 858 of 224 F.2d "While in an ordinary automobile collision the burden of proof is always on the plaintiff, in California where a taxicab is a public vehicle and there is an inference of its negligence in collision cases, the burden is on those responsible for its operation to go forward and present 'evidence sufficient to meet or balance the inference of negligence'. To satisfy this burden a common carrier must produce evidence tending to show either (1) a definite cause for the accident in which there exists no element of negligence on the part of appellees, or (2) such care in all possible respects as necessarily lead to the conclusion that the accident could not have been caused by want of a high degree of care on the part of the appellees. The burden is only that of going forward with sufficient evidence on these issues."

In the cited section of the Federal Digest there are numerous cases enunciating the burden of proof quo ad situations wherein a passenger on a public carrier is injured. See: Capital Transit Co. v. Jackson, 149 F.2d 839, 80 U.S.App. D.C. 162, 161 A.L.R. 1110 certiorari denied 66 S.Ct. 143, 326 U.S. 762, 90 L.Ed., 459; Atlantic Coast Line R. Co. v. De Mayo, 222 F.2d 462; Matsumoto v. Chicago & N.W. Ry. Co., 168 F.2d 496, certiorari denied, 69 S.Ct. 52, 335 U.S. 826, 93 L.Ed. 380.

Under Louisiana law the liability of a carrier is the same as that of an "innkeeper" and all that a passenger has to prove is the purchase of his ticket and the fact of his injury, whereupon the carrier has the burden of proving ordinary care. See: Hollinquest v. Kansas City Southern Ry. Co., 88 F Supp. 905.

Significantly in the memorandum decision of the State Supreme Court denying certiorari, Justice Calogero dissented in the followng words: (See Appendix B):

> CALOGERO, J. dissents from refusal to grant. Both the trial and appellate courts seem to have required of plaintiff a burden of proof not required of a fare paying common carrier passenger. See Wise v. Prescott, 244 La. 157, 151 So.2d 356 (1963).

It would thus appear that Louisiana has not only done violence to its own jurisprudence in cases of this kind but the action of the Fourth Circuit Court of Appeal and the State Supreme Court, completely ignores the rule prevailing in all Federal jurisdictions as well as most state jurisdictions. For the foregoing reasons we respectfully submit that a writ of Certiorari should be issued to the Supreme Court of Louisiana and that a new trial should be ordered.

Respectfully submitted,

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CERTIFICATE

I, George M. Leppert, hereby certify that I am a member in good standing of the bar of the Supreme Court of the United States that all of the statements of fact in the foregoing petition are true and correct and that copies of same have been served upon all opposing parties and upon the Clerk of the Supreme Court of Louisiana, properly addressed and postage prepaid on May ____, 1974.

GEORGE M. LEPPERT

APPENDIX A

No. 5705
Court of Appeal
Fourth Circuit
State of Louisiana

Bessie Duke Gonzales and Louis B. Gonzales

versus

Checker Cabs, Inc. Et Als

Appeal from the Civil District Court for the Parish of Orleans, State of Louisiana No. 443-280, Division "D", Honorable S. Sanford Levy Judge

(Court composed of Judges Pro Tempore Julian E. Bailes, Robert M. Fleming, and C. William Bradley)

This is a suit in tort arising out of a fall by the plaintiff-wife upon alighting from a taxicab. Plaintiff, Bessie Duke Gonzales, seeks recovery of damages for physical injuries received by reason of the fall and her husband, Louis B. Gonzales, sues for recovery of medical expenses and loss of wages of his wife.

The plaintiffs who are appellants herein appeal from the judgment of the trial court rejecting their claims on the ground that they did not sustain the burden of proving their case against the defendants by a preponderance of the evidence. Our review of the evidence convinces us that the judgment appealed from is correct and, accordingly, it is affirmed.

The plaintiff, Mrs. Gonzales, accompanied by three female co-workers, was a passenger in a Checker Cab driven by Julius W. Dietz, on December 23, 1964. The group was being transported from the Orleans Parish School Board Office on Carondelet Street to a restaurant on North Rampart Street in the City of New Orleans.

For a cause of action, plaintiffs allege that upon Mrs. Gonzales arriving at her destination and while in the act of exiting the cab the driver permitted the cab to roll forward causing her to fall to the street thereby sustaining the injuries for which she herein seeks recovery of damages.

The defendants, by answer, deny that the cab was in motion at anytime while Mrs. Gonzales was alighting from it, and that she fell by reason of her own failure or neglect to watch where she was walking.

The single narrow question dispositive of liability is whether at the time plaintiff was exiting the taxicab the vehicle moved forward thus causing plaintiff to fall to the ground whereupon she sustained certain injuries.

On a question of fact we cannot reverse the judgment of the trial court unless we find its holding so unsupported by the evidence as to render its ruling manifestly erroneous.

Two witnesses, both rear seat passengers, testified that the cab moved forward as plaintiff was getting

out. One of these witnesses, Mrs. Hackett, stated that she was the first passenger to get out the cab, that she got out before the plaintiff did and that she was standing on the sidewalk looking at Mrs. Gonzales as she alighted. Her testimony is that she saw the cab roll forward at the time Mrs. Gonzales was getting out.

The other witness who testified that the cab moved forward was Mrs. Shryel Brassett Billiot who, at the time of the fall, was seated on the rear seat of the cab. Her testimony as to the movement of the cab is weakened by her statement that she does not know whether Mrs. Gonzales had one or both feet on the ground at the time of the movement.

Both of these witnesses, shortly after the injury of plaintiff, gave statements to an adjuster for the company that provided automobile liability insurance on plaintiffs' personal vehicle which included medical payments coverage. Both statements failed to mention the asserted fact that the cab rolled forward as alleged.

Plaintiff, Mrs. Gonzales, did not testify that the cab moved when she got out. Her testimony is that after she had fallen to the ground she saw the cab rolling forward. By deposition prior to trial she testified, in response to the question of what caused her to fall, in this manner:

"I don't know what caused me to fall. I don't know. I just know when I started to get out, I fell."

The other passenger, Mrs. Fern Crappell, who died prior to the trial, by deposition taken July 13, 1966, testified that the cab was stopped when Mrs. Hackett got out and when Mrs. Gonzales got out, as well as when she alighted; and that the cab did roll forward after Mrs. Gonzales had fallen in the driveway. This witness also testified there was no discussion amongst the parties about what caused plaintiff to fall at the scene, nor did Mrs. Gonzales discuss it with her on the way to the hospital.

It is clear from the evidence in the record that there was no discussion by any one, including the plaintiff, at the scene of the fall that her fall was caused by the cab rolling or moving forward at the time she exited. It is also noteworthy that no demand or assertion was made against the defendants by either plaintiffs or their attorney until eleven months post injury.

After the fall, a police squad car stopped. Ronald H. Roth one of the policemen in the squad car stated that from his inquiry at the scene he determined that a vehicle was not involved in anyway in the injury of the plaintiff. Consequently, he made no accident report. One of the attendants, a policeman, on the emergency unit that took plaintiff to the hospital testified that on the way to the hospital plaintiff told him that she had got out of a cab and on walking away her heel became engaged in either a crack or separation of the pavement and this caused her to fall.

Defendant, Julius W. Dietz, driver of the cab testified that the cab did not move while Mrs. Gonzales was getting out.

As we stated above, the whole question of liability herein hinges on the establishment of the fact that the taxicab moved or rolled from a stopped position at the time Mrs. Gonzales was getting out. The law is too clear to require citation that a plaintiff has the burden of proof and that it is not sufficient for a plaintiff to make out a case that is merely probable but the requirement is that he must establish his case by a preponderance of evidence with legal certainty.

The evidence herein did not convince the trial court that the fact sought to be proved, that is, the movement of the cab at the time Mrs. Gonzales was alighting therefrom, was more probably so than not. We, too, are not convinced that the cab was in motion at this time. We find no error in the judgment of the trial court.

Accordingly, for the foregoing reasons, the judgment appealed is affirmed at plaintiffs' cost.

APPENDIX B

SUPREME COURT OF LOUISIANA

NEW ORLEANS, 70112
March 1, 1974

BESSIE DUKE GONZALES AND
LOUIS B. GONZALES

versus No. 54,390

CHECKER CABS, INC., ET AL

In re: Bessie Duke Gonzales and Louis B. Gonzales, applying for Certiorari, or writ of review, to the court of Appeal, Fourth Circuit, Parish of Orleans.

Writ denied. On the facts found by the Court of Appeal, the result is correct.

/s/ FWS
/s/ JWS
/s/ MEB
/s/ JAD
/s/ WFM

CALOGERO, J., dissents from refusal to grant. Both the trial and appellate courts seem to have required of plaintiff a burden of proof not required of a fare

paying common carrier passenger. See Wise v. Prescott, 244 La. 157, 151 So. 2d 356 (1963).

A TRUE COPY
Clerk's Office
Supreme Court of Louisiana
New Orleans
March 1, 1974
/s/ Phil Trice
Deputy Clerk